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No. 07-82

FILED
AUG 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

ROMANO CAMPOLI,

Petitioner,

vs.

HEALTHEXTRAS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT HEALTHEXTRAS, INC.'S BRIEF IN OPPOSITION

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LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The Petition states the names of the parties affected by the Summary Order of the United States Court of Appeals for the Second Circuit, which is under review.

HealthExtras, Inc. is a publicly traded company. There is no parent company or publicly held company that owns ten (10%) percent or more of its stock.

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RESPONDENT HEALTHEXTRAS, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, HealthExtras, Inc. ("HealthExtras"), respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Petitioner, Romano Campoli ("Campoli"), seeking review of the Summary Order of the United States Court of Appeals for the Second Circuit ("Court of Appeals" or "Second Circuit").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was issued on April 6, 2007, and was not published. It is set forth by Campoli as Appendix A to the Petition.[1] The opinion of the United States District Court for the District of Connecticut ("District Court") was issued on January 9, 2007, and also was not published. It is set forth by Campoli as Appendix B to the Petition. [2]

JURISDICTION

The United States District Court for the District of Connecticut in the first instance had diversity jurisdiction pursuant to 28 U.S.C. § 1332. That Court entered summary judgment for Respondent HealthExtras, and the judgment was affirmed by the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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[1] The unpublished Second Circuit opinion can also be located at *Campoli v. HealthExtras, Inc.*, No. 06-0539, 2007 WL 1113655 (2d Cir. (Conn.) April 6, 2007).

[2] The unpublished United States District Court opinion can also be located at *Campoli v. Chubb Group of Ins. Companies*, No. 3:04CV1004, 2006 WL 57391 (D. Conn. January 9, 2007).

STATUTES INVOLVED

The Petition accurately sets forth the pertinent statutory provision purported to be involved; however, Respondent maintains the Petitioner has inaccurately portrayed the issue presented.

STATEMENT OF THE CASE

A. Factual Background

Respondent HealthExtras is a provider of pharmacy benefit management services and supplemental benefits. (A-318 to A-319)[3]. As a provider of supplemental benefits, HealthExtras works with financial institutions to market programs that include insured and uninsured benefits. (A-319). Primarily, HealthExtras contracts with the benefit providers, which include insurance companies, with the broker of record, and with the financial institutions that offer the programs to their account holders, to provide such marketing services, as well as some post-enrollment services. (A-320).

Prior to November 1, 1999, HealthExtras marketed a series of health and disability programs ("Programs"), which consisted of underwritten and non-underwritten benefits. (A-263 to A-264). HealthExtras marketed these Programs through financial/credit institutions and other organizations ("Accounts") utilizing statement inserts, direct mail, tele-marketing and the Internet. (A-263 to A-264). HealthExtras was contractually obligated only to provide to the Accounts, who in turn would offer to their account holders, Programs that provided the applicable benefits. (A-263 to A-264). A second company, The Sklover Group, Inc. ("Sklover"), was utilized as the Program Manager/Broker, and as such, was required to satisfy licensure requirements and to perform

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[3] References to the Joint Appendix are designated by the letter "A."

certain administrative functions. (A-263 to A-264). A third company, Federal Insurance Company ("Federal"), was obligated to provide insurance benefits, including, in this case, the disability benefit. (A-263).

On or about October 5, 1999, HealthExtras entered into a business arrangement with Federal and Sklover, in which the parties agreed to provide the services described above, as part of the HealthExtras Benefit Program. (A-263 to A-264; A-265 to A-284). This arrangement was confirmed in a letter, dated October 5, 1999 ("Confirmation Letter") (A-263 to A-264), and later reaffirmed in the successor Administrative and Marketing Services Agreement, dated January 1, 2003 ("Marketing Agreement") (A-265 to A-284). As the Marketing Agreement confirms, Federal was the underwriter, with sole liability on coverage, of a one million ($1,000,000) dollar disability benefit ("Disability Benefit") being offered. (A-319 to A-320; A-323; A-324; A-327 to A-329; A-263 to A-264; A-265 to A-284).[4]

Thereafter, Campoli and his wife received from First USA, along with his credit card statement, an advertisement insert from HealthExtras advertising the HealthExtras Benefit Program. (A-285 to A-286; A-335). The insert contained a disclaimer establishing that the benefits were subject to the definitions, limitations, and exclusions stated in the HealthExtras Program Plan Description, and that the policy was underwritten by Federal, a member insurer of the Chubb Group of Insurance Companies. (A-286). Campoli enrolled in the HealthExtras Benefit Program, effective March 1, 2001. (A-287). A Program Summary was indeed provided to Campoli. (A-287; A-158). The Program Summary likewise specifically provided that the benefits were "subject to terms

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[4] The Disability Benefit is referred to in the HealthExtras Benefit Plan Summary and Plan Description as the $1,000,000 Catastrophic Injury and Disability Benefit. (A-287; A-288).

and conditions described in the Program Plan Description and in the Master Policies where applicable." (A-287). Campoli was provided the Plan Description, which set forth the Certificate of Insurance Declarations and the Certificate of Insurance Contract for the Disability Benefit. (A-288 to A-305). In Section I of the Certificate of Insurance Contract, entitled "Coverage," the Plan Description specified that Federal "will pay the applicable Benefit Amount if an Accident results in a Loss not otherwise excluded." (A-292).

Approximately eight months after Campoli was enrolled in the HealthExtras Benefit Program, he allegedly suffered an intracerebral hemorrhage to the right basal ganglia, which resulted in left hemiparesis, after falling and striking his head (A-158 to A-159; A-306 to A-309), and made a claim under the Disability Benefit underwritten by Federal. (A-312; A-314). Federal initially denied coverage, claiming, based on medical evidence gathered, that Campoli's disability was not caused by accidental injury; i.e., that a hemorrhage caused the fall and not the other way around. (A-306 to A-309). Thereafter, Campoli commenced this action by a Complaint filed in the United States District Court for the Northern District of Mississippi, challenging the denial of his claim for disability benefits under the Federal policy. (A-1 to A-41). The initial Complaint set forth causes of action for breach of contract and misrepresentation claims against all Defendants,

including HealthExtras.[5] (A-1 to A-41). The Complaint merely stated that "Defendants are liable for failing to honor the policy," without specifying which allegations and claims were being made against which of the four defendants. (A-1 to A-41; Complaint, p. 6, paragraph XII). Thus, Campoli's statement in the Petition that "the complaint had not pled expressly that HealthExtras is liable under a breach of contract theory" is a misleading statement of fact.[6] (Petition, p. 3).

In its Answer, HealthExtras denied the allegations, including specific denials that it was a party to the subject contract, and raised standard affirmative defenses, including "failure of consideration." (A-42 to A-48). Obviously, such a pleading should have established for Campoli that HealthExtras viewed this Complaint as potentially asserting a direct breach of contract claim against it. Clearly, then, Campoli could have clarified an intention to maintain this

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[5] In his Brief filed with the Second Circuit Court of Appeals, Campoli then asserted he had intended to raise only a misrepresentation claim, and not a direct breach of contract claim, against HealthExtras in the initial Complaint. (Brief of Appellant, p. 1). Yet, what becomes clear is that he knew such a claim could have been affirmatively asserted much earlier in the proceedings, and that he had ample opportunity to clarify and/or raise such a claim against this Respondent at the point Respondent answered the original Complaint, denying liability for direct breach of contract. However, as explored in detail in this Opposition, such facts underscore further the misplaced reliance on an argument that this same claim should have been "inferred" by Respondent by a reading of the subsequent, operative Complaint. (Brief of Appellant, pp. 1 and 12-13).

[6] Further, contrary to Campoli's assertion, no advertising material is attached to the initial Complaint, and the documents that are attached do not indicate that HealthExtras "agre[ed] to provide Campoli a $1,000,000.00 disability benefit upon Campoli's [sic] becoming disabled." (Petition, p. 3; A-1 to A-41). This assertion is thus another misstatement of fact.

claim very early in the proceedings — his first, and very early, opportunity to give HealthExtras fair notice of such intention.

The case was subsequently transferred to the District of Connecticut, and the parties filed their Joint Rule 26(f) Report. (A-54 to A-60; see p. 5). The Joint Rule 26(f) Report set October 15, 2004, as the deadline to file motions to amend the pleadings. (A-54 to A-60; see p. 5). However, on September 27, 2004, Federal moved to compel arbitration, relying on the arbitration provision contained in the Disability Benefit's Plan Description and the underlying policy (again, the contract at issue), and to stay or dismiss the action pending arbitration. (A-61 to A-63). The Court granted the motion as to Federal on November 5, 2004. (A-76 to A-78). HealthExtras and Sklover refused to voluntarily submit to arbitration, as all parties acknowledged at that procedural juncture that these entities were not parties to the insurance contract. (A-79 to A-81). Campoli did not argue that HealthExtras, or Sklover for that matter, should be equally bound to the policy, and thus to the arbitration clause, based on any claim that they were direct parties to the insurance contract. (A-68 to A-75). Accordingly, Campoli missed a second, early opportunity to raise this theory against Respondent.

Thereafter, a new Joint Rule 26(f) Report was filed, which set January 5, 2005, as the deadline to file motions to amend the pleadings. (A-84 to A-90). In describing Campoli's claims, the Joint Report expressly provided that HealthExtras and Sklover were liable for misrepresentation and, in the alternative, "for breach of contract and for failure to honor the terms of the policy ***under a joint venture theory***." (emphasis added) (A-85). Campoli thereby, as of that point in time, formally re-characterized his claims, and never requested that a direct breach of contract claim be referenced — missing his third, and still timely, opportunity to assert it

against Respondent. (A-85). Based on this Joint Report, the new scheduling order was entered, and on January 5, 2005, Campoli sought leave to officially amend his Complaint. (A-91 to A-92; A-100 to A-147). Leave was granted, and Campoli filed his First Amended Complaint on March 15, 2005 (A-155; A-156 to A-200), expressly alleging against HealthExtras two claims; i.e., misrepresentation and joint venture/vicarious liability, consistent with his references in the Joint Report. (A-156 to A-200). Conspicuously absent from the pleading was any claim for breach of contract against HealthExtras wherein direct liability was alleged as had been previously suggested in the initial Complaint. Not only was this opportunity the fourth, missed opportunity to put Respondent on notice that it was being sued for direct breach of contract, it also confirmed for HealthExtras that Campoli knew his direct breach of contract theory lacked merit and should not be pursued. [7] (A-156 to A-200). Thus, it bears repeating that, as of this procedural stage, Campoli had dropped the direct breach of contract claim he originally pled in the initial Complaint against all Defendants, including HealthExtras.[8]

Respondent filed after the close of discovery its Motion for Summary Judgment, which focused only on the two claims in the Complaint, briefing only arguments on those two claims. In its moving papers, in addressing the joint venture theory, Respondent reiterated that a direct breach of contract claim against it was not in the case. (A-238). Interestingly, in his papers opposing summary judgment, Campoli, after

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[7] After the case against Sklover was voluntarily dismissed on August 3, 2005, Campoli again did not seek leave to amend the First Amended Complaint. (A-212).

[8] Again, contrary to Campoli's assertion, the advertising material attached to the First Amended Complaint does not "promise to pay the $1,000,000.00 disability benefit or to assure that it was paid." (A-156 to A-200). This assertion is a misstatement of fact.

admitting the absence of a direct breach of contract claim in the operative Complaint, argued that he should be nevertheless permitted to pursue the contract claim against Respondent, either on a direct theory of liability, or, in the alternative, on the theory that Respondent was a guarantor on the contract — yet another, novel theory never before raised. (A-556 to A-561; A-674 to A-679). Campoli makes this argument, but did not even attempt to amend the Complaint accordingly.

In its Reply papers, Respondent argued:

> Noteworthy at this juncture, Campoli admits he failed to bring a breach of contract claim against [HealthExtras], but nevertheless argues that the allegations made in support of his now dismissed misrepresentation claim suffice to support this independent cause of action against [HealthExtras]. Irrespective of whether this Court agrees, Campoli's critical admissions in his Local Rule 56(a)(2) statement should be weighed against his contrary arguments presented in the opposition brief. Where, as here, a party admits to critical facts in the Local Rule 56(a)(2) statement, such judicial admissions can be used against that party in granting summary judgment.[9]

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[9] Local Civil Rule 56(a)(1) of the Rules of the United States District Court for the District of Connecticut requires the moving party to a motion for summary judgment to annex to the motion a document that sets forth those material facts, which the moving party contends are undisputed. These material facts are deemed admitted, unless denied by the non-moving party in that party's response, pursuant to Local Civil Rule 56(a)(2). Where a party admits to the material facts presented, such judicial admissions can be used against that party in granting summary judgment. *See, e.g., McMunn v. Pirelli Tire, LLC*, 161 F.Supp.2d 97, 104, n. 2 (D.Conn. 2001) (where the statement of undisputed facts is adequately supported to meet the requirements of Fed.R.Civ.P. 56, the Court considers it as part of the record for ruling on the pending Motion for Summary Judgment).

(A-571). Campoli admitted that HealthExtras, Federal and Sklover entered into a business arrangement, whereby Federal would underwrite the Disability Benefit, that HealthExtras had no binding authority with respect to the Disability Benefit, and that HealthExtras had no authority to determine the validity of, or otherwise handle, any claims arising from the Disability Benefit. (A-571). Respondent further emphasized in its papers that the claim it was a guarantor for Federal's contractual obligations was similarly a new theory Campoli should not be permitted to raise at this procedural stage. (A-666 to A-670). Even after the Reply papers were filed, Campoli made no effort to clarify or amend the pleadings.

During oral argument on the Motion for Summary Judgment, Campoli's counsel, realizing the attack on the sole, remaining claim was meritorious, attempted to argue before the lower Court that the action should nevertheless survive, with the Court permitting the action to continue on the previously withdrawn direct breach of contract claim. (A-693; A-731 to A-772). After Campoli admitted the Complaint did not contain an express, direct breach of contract claim against Respondent, the Court thoroughly explored the fact that Campoli had been presented with numerous opportunities to clarify that such a claim was intended to be encompassed by the operative Complaint, despite its prior removal, including as recently as Respondent's Reply papers wherein Respondent took the position it was no longer in the case. (A-693; A-731 to A-772). Thus, the presiding Judge, while he was under no obligation to do so, addressed Campoli's verbal attempt to essentially amend his Complaint on "oral motion" during the summary judgment argument, and thus be permitted to proceed on a direct breach of contract claim. (A-693; A-731 to A-772).

On January 9, 2006, the District Court granted summary judgment for HealthExtras on all stated claims. (A-684 to A-697). Appropriately, the Court rejected Campoli's eleventh hour attempt to put the direct breach of contract claim back into the litigation, and, among other things, cited the numerous opportunities Campoli had to affirmatively raise this claim in a more timely fashion prior to the summary judgment proceedings, along with the damaging admissions made by Campoli's counsel on the record relative to his reasons for not having done so. (Petition, Appendix B, Memorandum of Decision, pp 16-20; A-684 to A-697). In sum, after Campoli admitted this claim was not expressly in the operative Complaint, the Court refused his attempt to essentially add it by "inference." (Petition, Appendix B, Memorandum of Decision, pp 16-20; A-684 to A-697).

B. Procedural Background

HealthExtras filed its Motion for Summary Judgment in the United States District Court for the District of Connecticut on August 25, 2005. In his opposition papers, Campoli affirmatively stated that summary judgment should enter on the misrepresentation claim. (A-556). This left only one additional claim against Respondent — the claim that HealthExtras was vicariously liable for Federal's breach of contract based on a joint venture theory. (A-156 to A-200). The Court granted summary judgment as to this remaining claim on January 9, 2006. (A-684 to A-697).

Campoli did not appeal the lower Court's dismissal of the sole, remaining joint venture claim. Rather, on January 31, 2006, Campoli appealed that part of the District Court's ruling, which rejected his argument that the District Court and Respondent should have inferred from the initial Complaint and the First Amended Complaint, coupled with the documents attached thereto, that he intended to proceed with a claim against HealthExtras for direct breach of

contract, and that he should have been permitted to amend his Complaint at that point in time. (Brief of Appellant, pp. 1-18).

A decision affirming the judgment of the District Court was entered by the Second Circuit Court of Appeals on April 6, 2007. On April 25, 2007, the Court denied Campoli's petition for rehearing before the Second Circuit. Thereafter, Campoli filed this Petition, which was docketed by this Court on July 24, 2007.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Campoli cannot point to any reason, not to mention any compelling reason, to support his demand that this Court grant his Petition For a Writ of Certiorari. Initially, it bears emphasizing that the question presented by Campoli in his Petition does not even accurately reflect the Summary Order issued by the Court of Appeals for the Second Circuit, nor the Judgment of the United States District Court for the District of Connecticut. Specifically, contrary to what Campoli indicates in his Statement of the Case, the Court of Appeals did not rule that Campoli was required to state, with specificity, the "legal theory" upon which a claim for "breach of contract" was based. Rather, the Court found, in reviewing *de novo* the Judgment of the District Court, and especially in view of the undisputed facts as set forth above, that Campoli had failed to include in the operative Complaint "a short and plain statement" of a "breach of contract" claim against HealthExtras, wherein direct liability was alleged, giving HealthExtras "fair notice" that the claim existed by the point of summary judgment, and of the grounds upon which it was based.

The ruling of the Court of Appeals, as well as that of the District Court, are in accord with the notice pleading standard set forth in Rule 8(a) of the Federal Rules of Civil Procedure,

and with the precedent of this Court, specifically *Conley v. Gibson*, 355 U.S. 41, 47, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957) (defendant must have fair notice of the nature of plaintiff's claim). Therefore, with this Court having already addressed the notice pleading requirements set forth in Fed.R.Civ.P. 8(a), and with there being no conflict between the Summary Order of the Court of Appeals and the decisions of this Court and other Circuit Courts, the Petition for a Writ of Certiorari should be denied.

A. The Court of Appeals Decision Is Not In Conflict With This Court's Precedent And Correctly Found That Campoli's First Amended Complaint Did Not Contain Either Direct Or Inferential Allegations To Provide Fair Notice Of A Direct Breach Of Contract Claim

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading that sets forth a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In addressing this Rule 8(a), this Court has stated, "Specific facts are not necessary; the statement need only 'give the defendant ***fair notice of what the . . . claim is and the grounds upon which it rests***.'" *Erickson v. Pardus*, --- U.S. ---, 127 S.Ct. 2197, 2200, 167 L.Ed. 2d 1081 (2007) (citing *Bell Altantic Corp. v. Twombly*, 550 U.S. ---, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957)) (emphasis added). Accordingly, federal courts have stated that "federal pleading is by statement of claim, not by legal theory." *Newman v. Silver*, 713 F.2d 14, 15 n. 1 (2d Cir. (NY) 1983); *see In re Alstom SA Securities Litigation*, 454 F.Supp.2d 187, 214 (S.D.N.Y. 2006) and *Opals on Ice Lingerie v. Bodylines, Inc.*, No. 99 CV 3761,

2002 WL 718850, at *4 (E.D.N.Y. March 5, 2002) (unpublished decision);[10] *see also Shah v. Inter-Continental Hotel Chicago Operations Corp.*, 314 F.3d 278, 282 (7th Cir. 2002).

Although Campoli argues that a question of pleading standards "has been left unresolved for some time," namely, "whether a specific legal theory must be stated expressly in the pleadings," as stated above, Courts have unequivocally clarified the requirements of the notice pleading standard. Specifically, contrary to Campoli's assertion, *Bell Atlantic Corp.* and *Erickson* do not "leave a gap" that has not been, but should be, addressed by this Court. In both cases, this Court made clear that, as stated in *Conley v. Gibson*, in order to be sufficient, "the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson*, 127 S.Ct. at 2200 (citing *Bell Altantic Corp.*, 127 S.Ct. at 1964) (quoting *Conley*, 355 U.S. at 47)). Equally established is the principle that, in order to satisfy the notice pleading requirements of Fed.R.Civ.P. 8(a), a plaintiff need not plead the elements of a claim. *Hutton v. Priddy's Auction Galleries, Inc.*, 275 F.Supp.2d 428 (S.D.N.Y. 2003) (citing *In re Initial Public Offering Sec. Litig.*, 241 F.Supp.2d 281, 323 (S.D.N.Y. 2003) ("Rule 8(a) does not require plaintiffs to plead the legal theory, facts or elements underlying their claim.")). Rather, a plaintiff must expressly provide sufficient factual allegations from which a defendant may discern the nature of the claim against it. *See* James Wm. Moore, et al., *Moore's Federal Practice*, § 8.04 (3d. ed. 1997) ("Rule 8(a)(2) does not require a claimant to set forth any legal theory justifying the relief sought on the facts alleged, but does require sufficient factual averments to show that the claimant may be entitled to some relief.").

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[10] Unpublished decisions are attached hereto in the Appendix.

These principles are simply not at issue here. What is really at issue is, following a party's admission that a claim is not set forth in that party's Complaint, whether that party is nevertheless permitted to salvage an action from summary dismissal by compelling the other party to infer the existence of the claim, despite prior events such as those presented here. While Campoli attempts to couch the issue at hand as one involving the notice pleading standard, it is obvious that his real challenge is to the Court's refusal to permit an untimely, and then prejudicial, amendment. *See Rachman Bag Co. v. Liberty Mut. Co., Inc.*, 46 F.3d 230, 234 (2d Cir. 1995) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)) (courts have discretion to deny a request for leave, where the court finds "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, [or if amendment would cause] undue prejudice to the opposing party. . . .")). So, to avoid the implication of well established precedent permitting the lower Court to exercise great discretion in not permitting such untimely and prejudicial amendments, when admittedly no good cause existed to do so, Campoli attempts to couch this argument as one regarding "notice pleading."

Even if this Court agrees the issue involves the "notice pleading" standard, it is nevertheless clear that the lower Court's ruling was proper and in accordance with well established and consistent standards. To repeat, the Court simply ruled that Campoli would not be permitted to maintain a claim that had to be "inferred" from a collection of documents at a late procedural stage, despite ample and timely opportunity to be clear as to his intended claims. In this regard, the District Court appropriately, and within its discretion, rejected this attempt, based on, among other things: (a) the fact that Campoli had withdrawn a previously included direct breach of contract claim, from which Respondent was entitled to assume signified this claim/legal theory no longer existed in the action; (b) the fact that

Campoli did not proffer any even remote inferences of his intention to maintain such a direct claim in any subsequent filings; (c) the fact that Campoli's counsel admitted during oral argument that the claim was absent from the operative Complaint, and that he admitted to repeated failures to timely clarify any such intent by stating, among other things: "The reason I didn't plead it earlier is it just didn't occur to me. My brain didn't embrace it. When I first filed this claim, I thought it was a misrepresentation case." (A-735); and "The reason I [never pled a breach of contract claim] was, when it occurred to me that the breach of contract theory was our best theory, the time for amending had already expired." (A-769); and (d) the fact that he had expressly alleged in the operative Complaint that any attachments thereto supported the voluntarily dismissed misrepresentation claim, and were not referenced as supporting any other cause of action. (Petition, Appendix B, Memorandum of Decision, pp 16-20; A-684 to A-697). Such a ruling by the District Court was, on its face, thereby proper and in accordance with judicial precedent that is anything but "unsettled".[11]

The Second Circuit Court of Appeals likewise properly applied the well established notice pleading standard. In particular, the Court noted its *de novo* review of the District

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[11] In fact, counsel for Campoli acknowledged that the HealthExtras' documents "never really said that [HealthExtras was] going to pay if [an individual becomes] disabled" (A-735), and that his pleading relied on a joint venture theory to espouse a claim of vicarious liability for Federal's direct breach. (A-156 to A-200). Moreover, Campoli acknowledged to the Court during oral argument on the summary judgment motion that the Court needed to refer to documents annexed to the Complaint in order to "find" the essential elements of such a cause of action. (A-735). Yet, as the District Court aptly pointed out in response, the allegations of the First Amended Complaint cite to the attachments in support of the cause of action for misrepresentation. (A-695).

Court's determination of whether Campoli's complaint complied with the notice pleading requirements of Fed. R. Civ. P. 8(a), and held:

> "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).[12]

(Petition, Appendix A, Summary Order, p. 3). The Court reviewed the First Amended Complaint, and found that, "even under a generous reading," the Complaint did not confer "fair notice" to HealthExtras of a putative breach of contract claim against it.[13] (Petition, Appendix A, Summary Order, p. 3). In support of its decision, the Court further stated:

> No such claim was expressly included in the complaint, and, as the district court correctly noted, the elements of such a claim were not implied thereby or by the documents attached to the complaint. The district court therefore properly determined that ***the First Amended***

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[12] The Court of Appeals made note of Campoli's argument that a claim for breach of contract should be "inferred" as a legal theory from the complaint and the documents attached thereto, "even though [he] concedes that he did not include a direct claim for breach of contract in the First Amended Complaint." (Petition, Appendix A, Summary Order, p. 2).

[13] The District Court also gave a generous reading of the First Amended Complaint: "Mr. Campoli's counsel contends that a generous reading of his Complaint is appropriate and that, under such a reading, he did plead a direct breach of contract claim against HEI. The First Amended Complaint does no such thing." (Petition, Appendix B, Memorandum of Decision, p. 18).

> ***Complaint failed to include a "short and plain statement of the claim"*** that gave fair notice to the defendant of the substance of the breach of contract allegations.

(Petition, Appendix A, Summary Order, pp. 3-4) (emphasis added).

As these Courts recognized, then, the issue of whether the operative Complaint could be fairly read to include a breach of contract claim directly against HealthExtras must be resolved in HealthExtras' favor. (A-156 to A-200). As this Court noted in *Bell Atlantic Corp.*, "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests." 127 S.Ct. at 1965, n. 3. In addition, the Second Circuit has instructed that, "in order to prevail on a claim for breach of contract, one must specify what is the actual breach." *Namoury v. Tibbetts*, No. 3:04 CV 599, 2005 WL 81615, at *3 (D.Conn. Jan. 11, 2005) (unpublished decision) (citing *Breiner v. Stone*, No. 96-9091, 1997 WL 416942, at *2 (2d Cir. July 25, 1997) (unpublished decision) (Second Circuit Court held that it is not sufficient in a breach of contract claim to allege broad "misrepresentation;" where plaintiff has failed to allege a specific, expressed undertaking or promise by the defendant, the claim does not sound in "breach of contract")).

Although it is true that the Federal Rules of Civil Procedure are designed merely to give a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley*, 355 U.S. at 47, and, therefore, "federal pleading is by statement of claim, not by legal theory," *Newman*, 713 F.2d at 15 n. 1, the Court is "not require[d] . . .

to fabricate a claim that a plaintiff has not spelled out in his pleadings," 5 Wright & Miller, Federal Practice and Procedure § 1286 at 559 (2d ed. 1990).

The District Court, applying this precedent, stated in its ruling:

> To the extent that representations by [HealthExtras] are cited, they are cited in support of a misrepresentation claim only. And ***when that pleading turns to a breach of contract claim, the only breaches cited are breaches by Federal, for which Mr. Campoli seeks to hold [HealthExtras] vicariously liable***. There is no allegation that [HealthExtras] and Mr. Campoli entered into any contract, what the terms of the contract were, what terms [HealthExtras] (as opposed to Federal) breached, and how Mr. Campoli was damaged by [HealthExtras'] (as opposed to Federal's) breaches. Yet, these allegations are essential to pleading a breach of contract claim. Mr. Campoli's counsel asserts that he appended to his Complaint the documents that made up his client's contract with [HealthExtras], but those documents are referenced in the complaint as constituting false representations by [HealthExtras], not contractual undertakings.[14]

(Petition, Appendix B, Memorandum of Decision, p. 18) (emphasis added).

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[14] The District Court noted that "counsel for Mr. Campoli sought at oral argument to advance several new theories of liability, ***including a claim that HEI committed a direct breach of a contract*** it had entered into with Mr. Campoli ***and also that HEI had contractually guaranteed Federal's obligations*** under its insurance contract with Mr. Campoli. . . . [T]hese new theories suffer from a number of evidentiary and conceptual difficulties. However, the most significant-and ultimately fatal-problem with these new theories of liability is that they have never been pleaded." (Petition, Appendix B, Memorandum of Decision, p. 16).

Simply stated, the Summary Order of the Court of Appeals is patently consistent with this Court's decision in *Conley*. Campoli therefore cannot establish any compelling reason to warrant the granting of certiorari here.

B. The Decisions Below Are Consistent With Those of Other Circuits

Campoli's attempt to suggest a conflict exists between the Summary Order of the Court of Appeals and decisions of Courts of Appeal from various circuits, including the Second Circuit, is disingenuous. Nowhere in the Summary Order does the Court state that legal theories must be pled in order to satisfy the requirements of Fed.R.Civ.P. 8(a). Campoli's attempt to manufacture a conflict among the circuits, merely by claiming that the Rule 8(a) "is silent" as to whether a specific legal theory need be pled, masks an agenda that he knows renders this case unworthy of review. Simply put, the instant ruling is patently consistent with decisions below, and properly applies the notice pleading standard set forth in *Conley*.

C. The Decision Below Is Consistent With Those of This Court

Likewise, for those same reasons set forth above, the Summary Order of the Court of Appeals did not ignore this Court's precedent, and its application of such precedent was not "inconsistent" with the notice pleading standard established by this Court. (Petition, Appendix A, Summary Order). Nor did it in any way "rewrite" Fed.R.Civ.P. 8(a). Rather, the ruling correctly applied the notice pleading requirements set forth in Rule 8(a) and *Conley*, reviewing the operative Complaint to determine if it contained "a short and plain statement of the claim" which gave "fair notice" of what the claim was and the grounds upon which it rested.

In doing so, the lower Court determined, after "a generous reading," that the First Amended Complaint simply did not comply with the required standard.

Also, contrary to Campoli's assertions, the Second Circuit's Summary Order did not "broaden" the requirements of Rule 8(a), nor did it apply "heightened pleading requirements" beyond that required by Rule 8(a). Again, in keeping with Rule 8(a) and *Conley*, the lower Court reviewed the operative Complaint to determine if it contained "a short and plain statement of the claim," which gave "fair notice" of what the claim was and the grounds upon which it rested. In doing so, it did not use a heightened pleading standard used by the lower Courts in *Swierkiewicz, supra* (application of a heightened pleading standard for Title VII cases), and in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (application of a heightened pleading standard in a civil rights action alleging municipal liability), but which this Court rejected.[15] Furthermore, Campoli's argument ignores the particular facts of this case; namely, the numerous events which demonstrated an affirmative intention ***not*** to pursue this specific claim. While Respondent maintains a global view of events as a whole is not even necessary for this Court to deny this Petition, it nevertheless emphasizes that Campoli's desire that this Court view the issue in a vacuum, as if he had never before conducted himself contrary to his currently articulated intention, underscores the lack of merit to his request for Writ of Certiorari.

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[15] While Campoli insists that HealthExtras had "notice" of "a breach of contract claim" (Brief, p. 11), he does not even attempt to point to any "short and plain statement" purportedly giving HealthExtras "fair notice" of a direct breach of contract claim against it and the grounds upon which the claim rested, *see* Fed.R.Civ.P. 8(a); *Conley*, 355 U.S. at 47. It bears repeating that, to the contrary, he admits its absence and argues it should have been "inferred."

D. The Petition Does Not Present An Important Issue

For those same reasons explored in detail above, Campoli has blatantly failed to establish the existence of any constitutional or otherwise sufficiently important federal issue to warrant the grant of certiorari here. The Petition merely presents objections to the decision below, none of which are appropriate for this Court's review or resolution on this record. Campoli simply disagrees with the lower Courts' application of this Court's precedent to the allegations set forth in his First Amended Complaint. Such a disagreement is certainly not tantamount to constituting or presenting a conflict between a decision of any Circuit Court and any ruling of this Court, or otherwise of posing a significant issue for resolution.[16]

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[16] Respondent is confused by the final arguments put forth by Campoli that both the District Court and the Court of Appeals relied on "New York state law's pleading requirements in making their respective determinations." Simply stated, there is absolutely no basis in law or fact for this argument.

CONCLUSION

Petitioner Campoli fails to satisfy any applicable standard required for the grant of a Petition for a Writ of Certiorari. Consequently, based on the foregoing reasons, Respondent HealthExtras, Inc. respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

United States District Court, E.D. New York.

OPALS ON ICE LINGERIE, Designs by Bernadette, Inc.,

Plaintiff,

v.

BODYLINES, INC., d/b/a CURVES,

Defendant.

No. 99 CV 3761(ILG).

March 5, 2002.

David P. Lennon, Esq., Lennon & Klein, P.C., New York.

Michael A. Haskel, Esq., Haskel & Cooper, Garden City.

MEMORANDUM & ORDER

GLASSER, District J.

In this action, plaintiff Opals on Ice Lingerie, Designs by Bernadette, Inc. ("Opals") seeks to compel Bodylines, Inc. d/b/a Curves ("Bodylines") to submit to an arbitration pending before the American Arbitration Association in New York. Opals also seeks a declaration that a Non-Circumvention Agreement purportedly signed by Bodylines's president is binding and enforceable. Bodylines has filed counterclaims against Opals, seeking declarations that (i) the agreement is unenforceable and (ii) Bodylines cannot be compelled to submit to the arbitration. The parties have now cross-moved for summary judgment. For the reasons set forth below, Bodylines's motion is granted, and Opals's cross-motion is denied.

BACKGROUND

Opals is a New York corporation with its principal place of business in Brooklyn, New York. (*See* DiVito Aff. ¶4.) Opals is engaged in the business of designing, manufacturing

and selling ladies lingerie products. (*See id.*) Bodylines is a Nevada corporation with its principal place of business in California. (*See* Sautter Aff. ¶2.) Bodylines markets and distributes women's intimate apparel through catalogs, mail-order, and the Internet. (*See id.*)

In September of 1997, Irwin Karnick, the president of MZ, Inc., a catalog/production firm that was providing catalog services to both Opals and Bodylines, introduced Opals to Bodylines. (*See* DiVito Aff. ¶6; Sautter Aff. ¶4.) Opals and Bodylines then began discussing the possibility of Bodylines selling certain of Opals's products. (*See* DiVito Aff. ¶7; Sautter Aff. ¶4.) In the course of negotiating an arrangement, Bodylines and Opals exchanged certain draft agreements, including drafts of at least two Non-Circumvention Agreements and a Confidentiality Agreement. (*See* DiVito Aff. ¶¶7-8 & Exs. A-C; Sautter Aff. ¶¶5-7 & Exs. A-1, D-E.) Opals also provided Bodylines with a number of samples of its products. (*See* DiVito Aff. ¶10; Sautter Aff. ¶8.) In the end, however, no arrangement was reached between Bodylines and Opals concerning the sale of Opals's products by Bodylines. (*See* Sautter Aff. ¶¶8-9; *see also* Compl. ¶17.)

Opals alleges that, not long after providing Bodylines with samples of its products, Bodylines "misappropriated Opals['s] designs, and proceeded to manufacture and distribute product lines of garments substantially identical to the trade secrets, designs and products belonging to Opals which were previously furnished to [Bodylines]." (Compl.¶18.) Accordingly, on May 18, 1999, Opals served Bodylines with a demand for arbitration before the American Arbitration Association in New York, seeking $5 million in damages from Bodylines as a result of the alleged misappropriation. (*See* DiVito Aff. Ex. F.) Opals commenced arbitration proceedings instead of litigation due to a Non-Circumvention Agreement (the "Agreement"), which was purportedly executed by Julie Sautter, Bodylines's president.

The Agreement-which, by its terms, limits Bodylines's right to copy, use or modify any of Opals's products-contains a provision stating: "Any dispute arising under or relating to this Agreement shall be submitted to binding arbitration in the State of New York pursuant to the rules for commercial arbitrations of the American Arbitration Association." (Compl.Ex. A.)

Bodylines, however, refused to submit to the arbitration, alleging that it never signed the Agreement and that Sautter's signature thereon was a forgery. (*See* DiVito Aff. Ex. G.) As a result, Opals commenced this action on June 2, 1999, seeking a declaration that the Agreement is valid and enforceable, and also seeking to compel Bodylines to submit to the arbitration. The sole factual basis for the relief sought by Opals in its Complaint is Bodylines's purported execution of the Agreement, which, according to Opals, requires arbitration of the parties' dispute. (*See* Compl. ¶¶23-26; *see also id.* Prayer For Relief.)

In the meantime, the AAA decided that the issue of arbitrability could properly be decided by a panel of arbitrators. The AAA therefore directed the parties to submit briefs on this issue. (*See* DiVito Aff. Ex. G.)[1] Bodylines, citing the cost of preparing briefs on the issue, instead chose to participate in the arbitration, "without prejudice to its defense." (December 15, 1999 letter from Peter Mallon, Esq. to Michael Namias, AAA Executive Administrator, a copy of which is annexed to DiVito Aff. Ex. G.) Bodylines thereafter participated in extensive pre-arbitration discovery. (*See* DiVito Aff. Exs. H-J.) Nevertheless, shortly after Bodylines chose not to brief the issue of arbitrability with the AAA, it commenced an action in California state court in which

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[1] The AAA recognized, however, that it would "abide by any court order directed against either party to the arbitration which is binding upon the parties." (Sautter Aff. Ex. F.)

it sought a preliminary injunction staying the arbitration. (*See* DiVito Aff. Ex. D.) The California court denied Bodylines's preliminary injunction motion.[2] Opals then removed the California state court action to federal court, and the parties agreed that the issue of arbitrability would be decided by this Court. (*See* Def. Mem. at 4.) Bodylines subsequently participated in three days of arbitration hearings. (*See* DiVito Aff. Exs. K-M.)[3] Bodylines continued to present its objections to the arbitration at those proceedings. (*See, e.g., id.* Ex. K at 3.)

DISCUSSION

I. *Standard for Summary Judgment*

Summary judgment "shall be rendered forthwith if the pleadings, depositions . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A "moving party is entitled to judgment as a matter of law [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1985) (internal quotation marks and citations omitted). In deciding a summary judgment motion, a court need not resolve disputed issues of fact, but need only determine whether there is any genuine issue to be tried. *Eastman Mach. Co. v. United States,* 841 F.2d 469, 473 (2d Cir. 1988). A disputed fact is

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[2] Neither party has submitted a copy of the California court's decision to this Court. Therefore, on the present record, the Court is unaware of the reason the California court denied Bodylines's motion.

[3] The three days of hearings amounted to only half of the time scheduled by the AAA for the arbitration. (*See* November 23, 1999 AAA Scheduling Order, a copy of which is annexed to DiVito Aff. Ex. G.) For this reason, it appears that the arbitration has not been concluded, and that there has been no decision by the arbitrator.

material only if it might affect the outcome of the suit under the governing law. A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a reasonable jury could return a verdict in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986). "In assessing the record to determine whether there is a genuine issue of fact, the court is required to draw all inferences in favor of the party against whom summary judgment is sought." *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989).

II. *The Agreement is Unenforceable, and Bodylines Cannot be Compelled to Submit to Arbitration*

Although the parties' briefs obfuscate the issues, at bottom this case comes down to one simple point: both parties agree that Sautter's signature on the Agreement is a forgery created by a "photocopy transposition," *i.e.*, it was "cut" from one document and "paste[d]" onto the Agreement. (*See* Sulner Aff. ¶6(b) (a copy of which is annexed to the Sautter Aff. as Ex. G); Sautter Aff. Ex. H; Pl. Reply at 10 n. 4.)[4] Accordingly, both the Agreement and the arbitration clause therein are unenforceable. *See, e.g., Orlosky v. Empire Sec. Sys., Inc.*, 230 A.D.2d 401, 403, 657 N.Y.S.2d 840, 842 (3d Dep't 1997) ("Under [New York] law and general contract law, a forged signature renders a contract void *ab initio*.") (citing, *inter alia*, 10 Williston on Contracts § 1139 at 393 (3d ed. 1967)); *Oberlander v. Fine Care, Inc.*, 108 A.D.2d 798, 799, 485 N.Y.S.2d 313, 314-15 (2d Dep't 1985) (forgery of signature on contract, if proven, would "invalidate the entire agreement, including the arbitration clause"

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[4] Opals perversely suggests that *Bodylines* cut and pasted Sautters's signature. (*See* Pl. Reply at 10 n. 4.) Such a suggestion is incredulous, to say the least; there is absolutely nothing in the record to suggest that Bodylines had any reason to cut and paste its own president's signature from one document to another, and, indeed, it makes little sense to believe that Bodylines would have done so.

contained therein). And yet in its Complaint, the only basis upon which Opals seeks to compel Bodylines to submit to the arbitration is Bodylines's purported execution of the Agreement. (*See* Compl. ¶¶20-26.) Because the Agreement and the arbitration clause are void and unenforceable, it necessarily follows that Bodylines cannot be compelled to submit to the arbitration pursuant to the terms of the Agreement.

Opals, recognizing the invalidity of the Agreement, attempts to convince the Court that the validity of the Agreement is immaterial. Opals contends that "[u]nder the doctrine of separability, only challenges to the arbitration agreement are decided by the courts; challenges to the overall contract must be referred to arbitration." (Pl. Reply at 4 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)).) However, Opals's reliance on *Prima Paint,* and similar cases, is misplaced. As this Court has previously held:

> Where . . . a 'fraud in the factum' is alleged, the *Prima Paint* notion of the severability of the arbitration clause has no application. In raising a claim of fraudulent inducement of contract, a party must argue that its knowing assent to the terms of the contract followed from a false promise by the other side. Thus, unless the specific arbitration provision itself was obtained via a false promise, the signatory has fairly agreed to submit disputes to arbitration. By contrast, where fraud in the factum of the entire contract is alleged, it makes no sense to apply *Prima Paint's* requirement of a specific attack on the making of the arbitration clause itself. If no agreement ever arose between the parties, there can be no severable agreement to arbitrate. *Similarly, if a party's signature were forged on a contract, it would be*

> *absurd to require arbitration if the party attacking the contract as void failed to allege that the arbitration clause itself was fraudulently obtained.*

Kyung In Lee v. Pac. Buillion (New York) Inc., 788 F.Supp. 155, 157 (E.D.N.Y. 1992) (emphasis added); *see also Matter of Arbitration Between Nuclear Elec. Ins. Ltd. & Cent. Power & Light Co .*, 926 F.Supp. 428, 434 (S.D.N.Y. 1996) ("Where . . . a party claims that it never actually manifested assent to a contract containing an agreement to arbitrate-for example, because its signature was forged on the contract . . . that party cannot be forced to arbitrate until it is first established by a court that the party willingly manifested assent to the underlying contract.").[5]

Opals also argues that Bodylines should be compelled to submit to arbitration because Bodylines sent a draft Non-Circumvention Agreement to Opals which contained an arbitration clause-and thus Bodylines indicated its assent to arbitration-even though Opals never signed the draft agreement.[6] In support of its argument, Opals cites numerous cases in which courts have held that an agreement to arbitrate need not have been signed, so long as the agreement demonstrated an intent by the drafter to consent to arbitration. (*See* Pl. Reply at 6-9.) Those cases, however, are inapposite. Here, the question is not whether Bodylines indicated an intent to arbitrate any disputes it might have with Opals by virtue of

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[5] There is no doubt that a forged signature on a contract is a "fraud in the factum." *See, e.g.*, E. Allan Farnsworth, Contracts § 4.10 (2d ed. 1990) (fraud in the "factum," or the "execution," occurs where a misrepresentation goes "to the very character of the proposed contract itself, as when one party induces the other to sign a document by falsely stating that it has no legal effect").

[6] At oral argument, Opals suggested that it had signed a draft agreement sent by Bodylines to Opals which contained an arbitration clause. Yet Opals was unable to direct the Court's attention to any agreement which was signed by both Opals and Bodylines.

the fact that it exchanged draft agreements with Opals. Rather, the issue to be resolved on these cross-motions for summary judgment is limited to the claim set forth in Opals's Complaint, namely, whether Bodylines can be compelled to submit to arbitration *because of the arbitration clause in the Agreement.* At no time prior to filing its Opposition to Bodylines's summary judgment motion did Opals assert that Bodylines should be compelled to submit to arbitration because it exchanged draft agreements with Opals. Rather, Opals has consistently argued that Bodylines should be compelled to submit to the arbitration because of the arbitration clause in the Agreement.

Opals therefore cannot succeed on its motion by alleging these new bases for relief, which it has never previously raised. Although it is true that the Federal Rules of Civil Procedure are designed merely to give a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson,* 355 U.S. 41, 47 (1957), and, therefore, "federal pleading is by statement of claim, not by legal theory," *Newman v. Silver,* 713 F.2d 14, 15 n. 1 (2d Cir. 1983); *see also Gins v. Mauser Plumbing Supply Co.,* 148 F.2d 974, 976 (2d Cir. 1945) ("particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not"), the Court is "not require[d] . . . to fabricate a claim that a plaintiff has not spelled out in his pleadings," 5 Wright & Miller, Federal Practice and Procedure § 1286 at 559 (2d ed. 1990). Were it otherwise, a defendant would be unable to "tailor its discovery to prepare an appropriate defense." *Beckman v. United States Postal Serv.,* 79 F.Supp.2d 394, 407 (S.D.N.Y. 2000). Thus, courts have consistently ruled that "it is inappropriate to raise new claims for the first time in submissions in opposition to summary judgment." *Id.* (citations omitted); *accord Caribbean Wholesale & Serv. Corp. v. U.S. JVC Corp.,* 963 F.Supp. 1342, 1359 (S.D.N.Y. 1997) ("[Plaintiff] in effect is apparently attempting to add

a claim never addressed, or even hinted at, in the complaint. Such a step is inappropriate at the summary judgment stage, after the close of discovery, without the Court's leave, and in a brief in opposition to a dispositive motion. Summary judgment cannot be granted as to this 'claim' because it is not a claim."); *Allen v. West Point-Pepperell, Inc.*, 908 F.Supp. 1209, 1224 (S.D.N.Y. 1995) ("A motion for summary judgment is not the appropriate place to present new claims which effectively amend the complaint.") (citation omitted). As one court has stated:

> The potential exposure of the defendants in a litigation is controlled by the allegations set forth in the initial pleading. Fairness dictates that defendants be given a minimum degree of forewarning as to the underlying basis for the relief sought. Thus, even though the Court will liberally construe the substance of the information provided in the complaint and in particular situations may not require that the specific legal theory be identified, at least some notion of the grounds justifying the remedies sought in the proceedings must appear.

Ocaso, S.A., Compania de Seguros y Reaseguros v. P.R. Mar. Shipping Auth., 915 F.Supp. 1244, 1253 (D.P.R. 1996). The only "notion of the grounds justifying the remedies sought" in Opals's Complaint is the Agreement. Since the Court has already determined that the Agreement is unenforceable, the Court finds no basis to compel Bodylines to arbitrate.[7]

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[7] Furthermore, to the extent Opals is impliedly asking the Court for leave to amend its Complaint, the Court will not do so at this late stage. *See Beckman*, 79 F.Supp.2d at 408 ("[l]eave to amend a complaint will generally be denied when the motion to amend is filed solely in an attempt to prevent the Court from granting a motion . . . for summary judgment, particularly when the new claim could have been raised earlier") (alteration in original) (citations omitted).

Finally, Opals argues that Bodylines has waived its right to object to the arbitrability of the parties' dispute because (i) Bodylines agreed to submit the issue of arbitrability to the AAA, and (ii) Bodylines extensively participated in the arbitration up to this point. (*See* Pl. Mem. at 7-12.) Neither of these arguments has merit. As to the first point, Opals directs the Court's attention to a June 17, 1999 letter from Bodylines's counsel to the AAA administrator which allegedly indicates that Bodylines submitted the issue of the arbitrability to the arbitrators for a decision. (*See* Pl. Mem. at 9-10.) Nothing in that letter, however, indicates that Bodylines was willing to submit this issue to the administrator for a decision. In fact, Opals's argument is belied by Bodylines's later correspondence indicating that it intended to have a court resolve the issue. (*See* November 17, 1999 letter from Peter Mallon, Esq. to Michael Namias, AAA Executive Administrator, a copy of which is annexed to DiVito Aff. Ex. G.)

Nor is there any merit to Opals's contention that, by participating in the arbitration to this point, Bodylines has waived its right to contest the arbitrability of the parties' dispute. In support of its argument, Opals cites *New York Hotel & Motel Trades Council v. Hotel Nikko of New York, Inc.*, Nos. 91 Civ. 0795, 91 Civ. 0755, 1991 WL 168284 (S.D.N.Y. Aug. 22, 1991). In *Hotel Nikko,* the court refused to find that the defendant had preserved its objection to the arbitrator's jurisdiction because (i) no pre-hearing submissions indicated that the defendant contested jurisdiction, (ii) nothing in the record suggested that the defendant refused to brief the issue of jurisdiction, (iii) the defendant never moved for a stay of the arbitration proceedings, and (iv) the only item in the record indicating that the defendant had objected to the jurisdiction of the arbitrator was submitted *after* the arbitration hearing. *See id.* at *4-5. Accordingly, the court held that the defendant's conduct did not "clearly evince its objection to jurisdiction." *Id.* at *4.

In this case, however, Bodylines has repeatedly "evinced its objection" to the AAA's jurisdiction. Indeed, numerous letters from Bodylines indicate its objection to jurisdiction (*see* DiVito Aff. Ex. G); Bodylines refused to brief the issue of jurisdiction before the arbitrator, choosing instead to have a court resolve the issue (*see id.*), and, in fact, the arbitrators never resolved the issue; Bodylines moved for a stay of the arbitration proceedings (albeit belatedly); and Bodylines raised the issue of arbitrability *before* the end of the arbitration proceedings.[8] *Hotel Nikko,* therefore, lends no support to Opals's argument. In fact, given the AAA's willingness to proceed with the arbitration despite the jurisdictional issue, as well as the fact that the California court refused to enjoin the arbitration, Bodylines likely had little choice but to participate in the arbitration proceedings, or else risk default.[9] At every stage of the proceedings, however, Bodylines has raised its objection to the jurisdiction of the arbitrators. Thus, it cannot be said that Bodylines waived its right to contest the arbitrability of this dispute.

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[8] As such, contrary to Opals's assertion, Bodylines has not "participate[d] in an arbitration, with the assurance that if it loses it may later challenge whether it had ever agreed to arbitration." (Def. Mem. at 10 n. 7 (quoting *Halley Optical Corp. v. Jagar Int'l Mktg. Corp.*, 752 F.Supp. 638, 639 (S.D.N.Y. 1990)).)

[9] In a footnote, Opals argues that the California court's denial of Bodylines's preliminary injunction motion should estop Bodylines from arguing that it cannot be compelled to arbitrate the current dispute. (*See* Pl. Mem. at 9 n. 6.) Collateral estoppel, however, cannot preclude Bodylines from raising this issue, because the California court's denial of Bodylines's preliminary injunction motion was not a final judgment on the merits. *See Flaherty v. Lang,* 199 F.3d 607, 613 (2d Cir. 1999) (valid and final judgment required to implicate collateral estoppel).

CONCLUSION

For the foregoing reasons, Bodylines's motion for summary judgment is granted, and Opals's cross-motion for summary judgment is denied. The Clerk of the Court is directed to close this case.

SO ORDERED.

United States District Court, D. Connecticut.

Ahmed M. NAMOURY,

Plaintiff

v.

Alfred P. TIBBETTS, Tibbetts Keating & Butler, LLC; Wini B. Mola and Wini Mola Realtors, LLC,

Defendants

No. 3:04 CV 599(WWE).

Jan. 11, 2005.

Leon J. Greenspan, Greenspan & Greenspan, White Plains, NY, for Plaintiff.

Christopher L. Brigham, Updike, Kelly & Spellacy, P.C., New Haven, CT, Jules Lang, Lepofsky, Lepofsky & Lang, Norwalk, CT, for Defendants.

RULING ON DEFENDANTS' MOTION TO DISMISS

EGINTON, J.

This action concerns an allegation of legal malpractice and real estate brokerage malpractice arising out of defendants' Alfred P. Tibbetts; Tibbetts Keating & Butler, LLC; Wini Mola Realtors, LLC and Wini B. Mola's representation of plaintiff Ahmed N. Namoury regarding a series of real estate transactions involving a conveyance of property owned by plaintiff. Plaintiff has filed a ten-count complaint alleging, as to all defendants, breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty and violation of CUTPA and, as to defendants Tibbetts and Tibbetts Keating & Butler, LLC, negligence/legal malpractice and, as to defendants, Wini Mola Realtors, LLC and Wini B. Mola, negligence/real estate brokerage malpractice.

Defendants Tibbetts and Tibbetts Keating & Butler, LLC timely filed a motion to dismiss counts against them: count one (breach of contract); count two (breach of the covenant of good faith and fair dealing) and count five (CUTPA). Defendants Wini Mola Realtors, LLC and Wini B. Mola timely filed their motion to dismiss counts against them: count six (breach of contract), count seven (breach of the covenant of good faith and fair dealing), and count ten (CUTPA). For the following reasons, the Court will deny defendants Tibbetts and Tibbetts Keating & Butler, LLC's motion as to count one and will grant their motion as to count two and five. Additionally, the Court will deny defendants Wini B. Mola and Wini Mola Realtors, LLC's motion to dismiss count six and will grant their motion as to counts seven and ten.

I. *Background*

Consistent with the standard of review for a motion to dismiss, the Court considers all of the factual allegations to be true.

In early October, 2001, plaintiff entered into a transaction whereby he planned to sell a parcel of property located at 79 Valley View Drive, Stamford, Connecticut ("the property") to Nettie and Samuel Thomas ("the Thomases"). Plaintiff engaged Alfred P. Tibbetts ("Tibbetts"), a partner in the law firm of Tibbetts Keating & Butler, LLC, to represent him for this sale. At all times relevant to this action, Tibbetts represented plaintiff.

Wini Mola Realtors, LLC ("WMR") is a limited liability company licensed to act as a real estate brokerage and Wini B. Mola ("WBM") is the operative broker thereof. WMR and WBM acted as the real estate brokerage and broker, respectively, for plaintiff's sale of the property to the

Thomases. WMR and WBM brought the Thomases to plaintiff for the Thomases purchase of plaintiff's property and were paid a brokerage fee of $37,000.00.

The purchase price of the property was $740,000.00 with the sum of $724,000.00 payable toward the purchase secured by a note and purchase money mortgage. The Thomases were the grantees/mortgagors and plaintiff was the designated mortgagee. In addition to the note and mortgage, the Thomases paid $16,000.00 in cash to plaintiff. Prior to the closing, in early July, 2001, Tibbetts produced a personal financial statement of the Thomases that indicated that they were financially able to purchase the property and pay the note and mortgage pursuant to schedule.

Unbeknownst to plaintiff, there were tax liens and other judgments against Nettie Thomas prior to and at the time of the closing, which took place in early October, 2001. In mid-January, 2002, Nettie Thomas died and Samuel Thomas, as survivor, became the sole owner of the property. Prior to her death, the Thomases had individually filed for bankruptcy and both had tax liens and judgments filed against them. Upon Nettie's death, the liens against her became liens against the entire property. Thereafter, Samuel Thomas failed to make payments and the mortgage went into default. In July, 2002, in lieu of foreclosure, Thomas reconveyed the property to plaintiff, who became the holder of the purchase money mortgage.

In late April, 2003, plaintiff sought to sell the property to another individual. In order to provide the buyers with a title free of encumbrances, plaintiff had to pay off the lien then attached to the property.

II. *Discussion*

The function of a motion to dismiss is "merely to assess the legal feasability of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Ryder Energy Distribution v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

A. Count One: Breach of Contract as against Tibbetts and the Law Firm

Plaintiff's breach of contract claim alleges that, as his attorneys for the conveyance of property, Tibbetts and the law firm were obligated to fulfill their responsibilities in concert with the prevailing custom and practice in Connecticut.

Plaintiff's allegations against defendants are based on their alleged failure to perform their duties as per the contractual agreement they had established. As part of this duty, it was Tibbet's and the law firm's responsibility to protect plaintiff's interests and take all steps reasonably necessary in order to facilitate the real estate transaction. In order to do so, plaintiff alleges, it was necessary to ascertain that the buyers of the property were, indeed, capable of such purchase and that the property, once conveyed, would be free and clear of all liens and judgments.

Specifically, plaintiff claims that defendant Tibbetts should have performed a title search and obtained an actual credit report of the Thomases, which would have alerted plaintiff as to the Thomases' inability to perform pursuant to the mortgage.

Furthermore, plaintiff claims that defendants breached their contractual obligations in that they failed to reveal to plaintiff that the tax liens and judgments levied against Nettie Thomas attached to the property following her death. Upon Samuel Thomas' default, the liens were attached to the property and plaintiff was liable for the debt in order to sell the property with clear title to a subsequent buyer. In consideration of the contractual obligations owed to plaintiff, plaintiff paid reasonable fees to defendants.

The Second Circuit has instructed that in order to prevail on a claim for breach of contract, one must specify what is the actual breach. In *Breiner v. Stone,* 1997 WL 416942 *2 (2nd Cir. (Conn.)), the court stated that it is not sufficient to allege broad "misrepresentation" or even "legal malpractice." If plaintiff has failed to allege a specific, expressed undertaking or promise by the defendant, the claim does not sound in "breach of contract." Instead, the claim is an allegation of negligence. "When a plaintiff alleges only that the defendant failed to perform legal services with the requisite level of care, the complaint sounds in negligence rather than contract. This is so even if the plaintiff also alleges that he 'retained' or 'engaged' the services of the lawyer."

This line between negligence and breach of contract, however, is often blurred. In *Rosato v. Mascardo,* 82 Conn.App. 396, 410-411, 844 A.2d 893 (2004), the court stated:

> Whether the plaintiff's cause of action is one for malpractice depends upon the definition of that word and the allegations of the complaint. Malpractice is

> commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. The elements of breach of contract are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages.

In the complaint, plaintiff describes the contours of the agreement established between him and defendants. Therein, plaintiff specifies what comprises defendants' breach of contract. Plaintiff claims defendants did not fulfill specific obligations inherent to the representation of a seller of property: a thorough title search and a credit report of the potential buyers. As a result of this breach, plaintiff suffered monetary damages: the assumption of the Thomases mortgage and note following the Samuel Thomas default and the payment of the tax lien and other judgments against the property.

Defendants argue that a breach of contract claim must allege that a defendant promised a specific result, as opposed to a general statement that the result will be successful. Defendants claim that no specific result was ever promised. However, plaintiff does not allege that one was promised. Instead, plaintiff alleges that he contracted with defendants to aid him in the sale of his property and that in order to do so, it is of base necessity to conduct a title search and obtain a credit report on the potential buyers. This is not a promise that the transaction will be successful. It is a contractual arrangement to take the practical steps necessary to undertake the transaction. Specifying the steps not undertaken by defendants, plaintiff is not making a general statement

regarding a level of care expected of all attorneys. It is a specific articulation of the breach of the existing contract and the resulting damages thereof.

For these reasons, defendants' motion to dismiss count one of plaintiff's complaint will be denied.

B. Count Two: Breach of the Covenant of Good Faith and Fair Dealing as against Tibbetts and the Law Firm

Defendants also move to dismiss count two of the complaint, namely, that the defendants acted in bad faith when they breached the contract. For the following reasons, the Court will grant defendants' motion to dismiss count two.

In order to prevail on a claim of bad faith, it is necessary for the complaint to allege a specific act that was performed purposefully, with a sinister intent. In *Buckman v. People Express, Inc.*, 205 Conn. 166, 170, 530 A.2d 596 (1987), the court stated that

> Bad faith is defined as the opposite of good faith, generally implying a design to mislead or to deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties . . . Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.

Here, no facts are alleged that would suggest any bad faith on the part of defendants. Even if it was found that there was a breach of contract, not all contracts are breached with a sinister intent. Even though plaintiff alleges specific

examples of defendants' breach of contract, he does not suggest that any of these acts were performed purposefully or with ill intent.

Within the contours of the complaint, therefore, it is not possible to read bad faith into plaintiff's allegations. Defendants' motion to dismiss count two of the complaint will be granted.

C. Count Five: CUTPA as to Tibbetts and the Law Firm

Count five of plaintiff's complaint alleges a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), as set forth in Conn. Gen.Stat. Section 42-110b(a). CUTPA provides penalties for any person or entity that engages in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. In order to determine what constitutes a violation under CUTPA, Connecticut has adopted the "cigarette rule:" "(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors or other business men." *A-G Foods, Inc. v. Pepperidge Farm, Inc., et al.* 216 Conn. 200, 215, 579 A.2d 69 (1990). It is not necessary to meet all three prongs of the test. Instead, the test contemplates the degree to which one satisfies one factor. *Fabri v. United Technologies International,* Inc., 387 F.3d 109, 120 (2004).

In the present case, plaintiff does not introduce any allegations of defendants' behavior that satisfy the prongs of the "cigarette rule." Plaintiff does not allege any fundamental "unfairness," "immorality," or "substantial injury to consumers" beyond the monetary damages he suffered solely

as a result of defendants' breach of the contract. As the Court does not find that there is any bad faith inherent to defendants' conduct, there is no expansive indication of unfair or deceptive acts that could involve the public. Plaintiff cannot allege the breach specific and limited to the narrow, individual circumstances of his contract with defendants, as he does in count one of the complaint, and then prevail on a CUTPA claim, which necessarily involves an overarching negative detriment that affects the public at large. Defendants' failure to conduct the searches necessary to conduct a personal real estate transaction do not touch upon the interests of the public. Therefore, defendants' motion to dismiss count five of the complaint will be granted.

D. Counts VI, VII and X as against Defendants WBM and WMR

For the reasons set forth in the preceding sections involving identical claims against Tibbetts and the law firm, the Court will deny count six of plaintiff's claims against defendants WMR and WBM. WMR and WBM's motion to dismiss counts seven and ten will be granted. As these defendants argue in their brief, "Traditionally, a Broker's obligation consists of and is limited to procuring a buyer ready, willing and able to purchase upon terms acceptable to the plaintiff." As is evident here, defendants failed to fulfill this obligation. Despite their representation to the contrary, they specifically failed to produce a buyer "able" to purchase plaintiff's property in that they neglected to find out if the Thomases were, indeed, "able." Thus, defendants breached their contractual obligation to plaintiff. However, there is not an indication of bad faith or sinister intent, nor is there any evidence of any CUTPA violation.

Accordingly, the Court will deny the dismissal of count six (breach of the contract) and grant the dismissal of counts seven (breach of the covenant of good faith and fair dealing) and ten (CUTPA).

III. *Conclusion*

Defendants Alfred P. Tibbetts and the Tibbetts Keating & Butler, LLC's Motion to Dismiss [Doc. # 12] is DENIED as to count one and GRANTED as to counts two and five. Defendants Wini Mola Realtors, LLC and Wini B. Mola's Motion to Dismiss [Doc. # 11] is DENIED as to count six and GRANTED as to counts seven and ten.

SO ORDERED.

United States Court of Appeals, Second Circuit.

Mark A. BREINER,

Plaintiff-Appellant,

v.

Sheldon STONE,

Defendant-Appellee.

No. 96-9091.

July 25, 1997.

Appeal from the United States District Court for the District of Connecticut (Covello, *Judge*).

Appearing for Appellant: John R. Williams, New Haven, Connecticut.

Appearing for Appellees: Katherine C. Callahan, Updike, Kelly & Spellacy, P.C., Hartford, Connecticut.

Present: HONORABLE RALPH K. WINTER, Chief Judge, HONORABLE DENNIS G. JACOBS, HONORABLE PIERRE N. LEVAL, Circuit Judges.

Mark A. Breiner appeals from Judge Covello's adverse grant of summary judgment in a legal malpractice action against Sheldon Stone. Breiner alleged that Stone, an attorney not licensed in Connecticut, acted negligently, in breach of contract, and in violation of the Connecticut Unfair Trade Practices Act, Conn. Gen.Stat. § 42-110a, *et seq.* ("CUTPA"), in his representation of Breiner in connection with the sale of Breiner's dental practice.

Breiner argues that the district court erred in determining that the statute of limitations for his negligence and CUTPA claims had run and that Connecticut common law barred his action for breach of contract.

Breiner's first argument, that the district court erred in holding that the statute of limitations for the negligence and CUTPA claims began to run on the date of the sale of the dental practice, lacks merit. As noted by the district court, both the negligence and CUTPA claims are governed by three-year statutes of limitations. Conn. Gen.Stat. § 52-577 (1995) (governing negligence claim); Conn. Gen.Stat. § 42-110g(f) (governing CUTPA claim). Both statutes of limitations are "occurrence statute[s], meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs." *S.M.S. Textile Mills, Inc. v. Brown, Jacobson, Tillinghast, Lahan and King, P.C.*, 32 Conn.App. 786, 790, 631 A.2d 340 (1993); *see Fichera v. Mine Hill Corp.*, 207 Conn. 204, 212-13, 541 A.2d 472 (1988). Because the complaint's allegations that Stone acted negligently and in violation of CUTPA all refer to actions completed on or before the sale date, the district court correctly used that date as the one from which to measure the statute of limitations period.

Breiner contends on appeal that because Stone allegedly continued to represent him after the sale date, the statute of limitations did not begin to run until the conclusion of the attorney-client relationship. Connecticut law, however, is to the contrary. "In order to toll the statute of limitations by reason of continuing tortious conduct, the plaintiff must allege in his complaint or present facts which reasonably support an inference of a *continuing breach of duty by the defendant.*" *Shuster v. Buckley*, 5 Conn.App. 473, 478, 500 A.2d 240 (1985) (emphasis added). Therefore, in addition to alleging the existence of a continuing attorney-client relationship, one must also allege a "continuing breach" of the duties engendered by that relationship in order to toll the statute of limitations period. *Id.; see Robbins v. McGuinness*, 178 Conn. 258, 261, 423 A.2d 897 (1979). Because Breiner's

complaint failed to allege any negligent acts or omissions occurring after the sale date, the district court correctly measured the statute of limitations period.

Breiner alternatively argues that because Stone "fraudulently concealed" from him the existence of a potential cause of action for malpractice, the tolling provision of Conn. Gen.Stat. § 52-595 applies. "Allegations of fraudulent concealment, like allegations of fraud, must satisfy the pleading requirements of Rule 9(b)." *Halbrecht v. Prudential-Bache Properties, Inc.*, No. CIV. H-90-799(JAC), 1992 WL 336757, at *5 (D.Conn. July 25, 1992). Because Breiner's complaint offers only the conclusory allegation that Stone "fraudulently concealed" information from him, Breiner has failed to plead fraud with the "particularity" that Rule 9(b) requires. Fed.R.Civ.P. 9(b). Section 52-595 is therefore not implicated.

Breiner's second argument, that his action for breach of contract is not barred under Connecticut law, is similarly unavailing. It is true that Connecticut law does not bar contract claims in all legal malpractice cases. *See Mac's Car City, Inc. v. DeNigris*, 18 Conn.App. 525, 530, 559 A.2d 712 (1989). However, when a plaintiff alleges only that the defendant failed to perform legal services with the requisite level of care, the complaint sounds in negligence rather than contract. *Shuster*, 5 Conn.App. at 478, 500 A.2d 240. This is so even if the plaintiff also alleges that he "retained" or "engaged [the] services" of the lawyer. *Id.* The only breach of contract alleged in Breiner's complaint is that "the defendant breached the [ ] contract by failing to provide competent legal representation. . . ." Under *Shuster*, Breiner's complaint sounds in negligence, not contract, and the district court correctly held that Breiner's complaint failed to state a claim for breach of contract.

We therefore affirm.